

## ADDENDUM TO RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

XXXXXXXXXXXXXXXXXX.

**DOCKET NUMBER:** BC-2016-02704-4

**COUNSEL:** NONE

**HEARING REQUESTED:** YES

### APPLICANT'S REQUEST

The Board reconsider his request he be promoted to the grade of lieutenant colonel (O-5) and be returned to active duty based on allegations of reprisal pursuant to DoDD 7050.06, *Military Whistleblower Protection*, and 10 U.S.C. § 1034.

### RESUME OF THE CASE

The applicant is a former Air Force major (O-4).

On 28 Feb 11, the applicant was command directed for a mental health evaluation.

On 7 Dec 11, the formal physical evaluation board (FPEB) recommended the applicant be returned to duty. His condition of delusional disorder, persecutory and possible personality disorder was not unfitting and did not prevent him from reasonably performing his duties. The FPEB noted his conditions might be unsuited rather than unfitting. On 9 Jan 12, the Secretary of the Air Force Personnel Council (SAFPC) returned the applicant to duty.

The applicant was nonselected for promotion by the CY12B and CY13B Lieutenant Colonel Central Selection Boards (CSB).

He was honorably discharged on 31 Mar 14 in the grade of major for his twice promotion deferral to the rank of lieutenant colonel (O-5). He was credited with 12 years, 6 months and 27 days of active duty service.

On 24 Jul 18, the Board denied his request. The Board reviewed the applicant's reprisal complaint ACTS 2012-017204; however, noted his allegations of reprisal were not substantiated and there was insufficient evidence to conclude the commander directed mental health evaluation contributed to his nonselection for promotion.

On 19 Feb 20, the Board reconsidered and again denied the applicant's request. The Board remained unconvinced the evidence presented demonstrated an error or injustice.

On 22 Jun 20 the applicant requested reconsideration of his request. The applicant provided a copy of a redacted numbered air force (NAF) commander directed investigation (CDI) report of investigation (ROI) dated 1 May 09, which showed an investigating officer (IO) substantiated two allegations that the working environment was hostile. He received a letter of counseling (LOC) in 2009 in reprisal after filing an inspector general (IG) complaint. The applicant contended the AFBCMR failed to apply 10 U.S.C. § 1034 and DoDD 7050.06 to his application. The Board reviewed the redacted ROI provided by the applicant which involved one formal and two informal complainants. The ROI included two substantiated allegations regarding a hostile work

environment in which [redacted] shared negative personnel actions taken against other officers and that [redacted] led through intimidation. SAF/IGQ provided an advisory opinion but did not make a recommendation. SAF/IGQ noted the applicant had a long history of filing IG complaints and that the complaints were not substantiated or dismissed. The applicant had a single reprisal complaint that was investigated pertaining to a downgraded award for making protected communication. The complaint was **NOT SUBSTANTIATED**. On 14 Apr 21 and 30 Apr 21, the Board reviewed the applicant's request and again denied his request. The Board did not find any connection between the applicant's complaints and the substantiated allegations in the redacted CDI ROI dated 1 May 09 to warrant reinstating the applicant into active duty. The Board also noted it was without authority to provide the applicant with a direct promotion to the grade of lieutenant colonel. The Board concluded there was no evidence the applicant was a victim of reprisal per 10 U.S.C. § 1034.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letter and Record of Proceedings at Exhibit R.

On 13 Sep 22, per the AFBCMR notification letter of the Board's denial of his request dated 2 Jun 21, the applicant appealed the Board's decision to the Office of the Secretary of Defense (OSD). In a letter to the Secretary of Defense (SecDef) dated 13 Sep 22, the applicant stated the Board denied his request to return to active duty although he provided evidence of numerous violations. The misconduct of the AFBCMR was due to his Whistleblower complaints which involved senior leaders, to include a former Air Force Chief of Staff (CSAF). The reprisal actions taken against him were provided in his case which the AFBCMR refused to accept. In addition to the pervasive harassment he endured, his foreign spouse was also harassed. The applicant requested the SecDef override the AFBCMR's decision and return him to active duty.

On 20 Jan 23, the Office of the Under Secretary of Defense (OUSD) remanded the applicant's request to the AFBCMR for reconsideration pursuant to 10 U.S.C. § 1034(h). OUSD directed the AFBCMR consider the IG's report related to the applicant's allegation of reprisal and all related matters submitted.

On 20 Jan 23, OUSD informed the applicant his request was remanded to the AFBCMR for reconsideration for the IG report regarding his reprisal allegations. The applicant was notified his reprisal appeal was complete.

The OUSD remand memorandums are at Exhibits S and T.

The applicant's reprisal complaint, ACTS 2012-017204 was included in the applicant's initial case and reviewed by the Board. However, the applicant's reprisal complaint, ACTS 2013-02044 was not provided to the Board for review. Per the OUSD remand that the Board review his allegations of reprisal, SAF/IG provided the following pertaining to his complaints:

ACTS 2012-17204: On 21 Feb 13, the major command inspector general (MAJCOM/IG) appointed an investigating officer (IO) to conduct an investigation into the applicant's complaint filed on 4 Sep 12. An investigation was conducted from 21 Feb 13 to 3 May 13. During his assignment, the applicant made multiple protected communications containing assorted allegations by various individuals. The applicant filed complaints with Members of Congress, the SecDef, Department of Defense (DoD) IG, MAJCOM IG, his chain of command, the Air Force Office of Special Investigation (AFOSI) and the Equal Opportunity (EO) Office. All of his complaints were reviewed by different agencies at various levels. None of the complainant's allegations were substantiated. At the end of his tour, his supervisor downgraded a decoration recommendation. Upon his permanent change of station (PCS) assignment, he filed an IG complaint alleging his decoration was downgraded from a Meritorious Service Medal (MSM) to an Air Force Commendation Medal (AFCM) in reprisal for his protected communications. The allegation that

on or about 18 Jul 12, his commander reprised against the applicant by downgrading his decoration after he made protected communication in violation of 10 U.S.C. § 1034 was **NOT SUBSTANTIATED**. The reasons his commander downgraded his award was stated in the commander's 5 Sep 12 email to the applicant that the input submitted for him did not justify nor merit an MSM. The preponderance of the evidence showed his commander's reason for downgrading the medal was the lack of substantive material to support the higher decoration. On 23 May 13, the MAJCOM IG approved the IO's finding.

ACTS 2013-02044: On 6 Feb 13, the applicant filed a reprisal complaint with the DoD IG Hotline. The applicant alleged he was improperly referred to mental health due to complaints he filed against senior military leaders. On 18 Mar 13, the DoD IG directed the SAF/IGQ to investigate the complaint of reprisal. On 16 Jul 13, an IO initiated a reprisal complaint analysis for the matter. On 7 Dec 11, the applicant was evaluated by the FPEB. Three independent psychiatrists diagnosed the applicant with delusional disorder with obsessive compulsive personality disorder features. He was also diagnosed with panic disorder and anxiety after being seen for chest pains. Other diagnoses included acne, eczema and acid reflux that the applicant reported was caused by stress. The FPEB determined he was fit for military service and should be returned to duty. The IG report shows the applicant emailed a major who was a chaplain in the White House Military Office, a friend from his prior assignment, and sent a courtesy copy of the email to the media stating the Central Intelligence Agency (CIA) operation against him was illegal. He stated he could only describe the prolonged negative actions against him as a hate crime, harassment and bullying. He indicated his latest DoD IG complaint included allegations against the CSAF, who they knew as the MAJCOM commander at the time of the hate crime, harassment and bullying. The applicant made 22 protected communications (PC) and filed several IG complaints with the Air Force and DoD IG System. The IO recommended the allegations be **DISMISSED**. The Air Force IG Complaint Analysis shows the applicant also filed an EO complaint on 2 Feb 11 regarding religious discrimination and sexual harassment. He was referred to the IG office since there was not a nexus to EO. The applicant submitted numerous complaints from 22 Dec 08 to 2013. The following complaints are covered in the SAF/IG report: ACTS 2011-02994, 2011-03022, 2011-01509, 2011-05431, 2012-017204, 2012-04150, 2013-00804, 2013-19099, 2012-21867 and ACTS 2013-19099. The allegations of reprisal were **DISMISSED**.

The complete SAF/IG reports are at Exhibits U, V and W.

#### **APPLICABLE AUTHORITY/GUIDANCE**

10 U.S.C. § 1034(a)(1) No person may restrict a member of the armed forces in communication with a Member of Congress or an IG.

10 U.S.C. §1034(g) Correction of Records When Prohibited Action Taken. 10 U.S.C. 1034(g)(1), A BCMR in resolving an application for the correction of records made by a member or a former member may review the matter. In accordance with 10 U.S.C. 1034(g)(2)(A) The BCMR shall review the report of the IG.

10 U.S.C. § 1034(h) Review by SecDef. Upon the completion of the administrative review, a member or a former member who made the allegation is not satisfied with the disposition of the matter may submit the matter to the SecDef. The SecDef shall make a decision to reverse or uphold the decision of the Secretary of the military department concerned in the matter within 90 days after receipt of such a submittal.

DoDD 7050.06, *Military Whistleblower Protection*, paragraph 3(j). At the request of a BCMR, ensure the IG submits a copy of the report on the results of the investigation or gathers further evidence.

## **APPLICANT'S ADDITIONAL SUBMISSION**

The applicant provides a draft federal complaint. He contends the AFBCMR has refused to accept evidence and failed to apply the facts of numerous reprisal actions and violations of law that were committed against him while he was serving on active duty. The reprisal and violations of law were committed in the destruction of evidence, the falsification of official documents, improper referrals to mental health, being placed in positions not commensurate with his rank and the downgrading of his MSM award. He reported the reprisal to members of Congress, the Air Force IG, DoD IG, SecDef, his promotion board and other organizations.

Due to the AFBCMR excluding evidence, not properly considering the evidence, making false statements, refusing to accept additional new evidence, refusal to provide him with a hearing and the numerous administrative failures of the AFBCMR as listed his Constitutional due process rights were violated and he was required to re-appeal his case with the SecDef.

He requests a reversal of the arbitrary and capricious decision of the AFBCMR and he be returned to active duty. The failures of the AFBCMR to include critical facts in the Record of Proceedings and the numerous violations of the Military Whistleblower Protection Act and abuse of discretion. He incurred injustices and his Constitutional due process rights were violated.

The applicant's complete submission is at Exhibit X.

## **FINDINGS AND CONCLUSION**

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board remains unconvinced the evidence presented demonstrates an error or injustice. The Board reviewed the applicant's complaints of reprisal per the OUSD remand and 10 U.S.C. § 1034 and conducted an independent review of the complete case and finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant contends the AFBCMR refused to accept evidence concerning his reprisal complaints, failed to properly apply the facts and committed misconduct due to his allegations of reprisal and wrongdoing by senior Air Force leaders, to include a former CSAF. However, the Board notes no complaints the applicant filed were substantiated to support any allegations of reprisal or wrongdoing. Moreover, no evidence was excluded and the Board conducted an exhaustive review of the applicant's case. The Board finds other than the applicant's uncorroborated assertions he was reprised against and was the victim of abuse of authority and harassment, no evidence has been presented to substantiate this to be the case. In this respect, the Board did not find any evidence his award was downgraded and he was command directed for a mental health evaluation in reprisal or that the referral to mental health resulted in his promotion deferral to the rank of major and subsequent honorable discharge for failing promotion. Based on the evidence, it appears the applicant's complaints were thoroughly reviewed by IG offices at the wing, major command, Air Force and DoD IG and no allegations were substantiated. In view of the above, the Board finds the applicant has not sustained his burden of proof to warrant reversal of the IG's findings to substantiate any allegation of reprisal to warrant reinstatement onto active duty. Moreover, while the applicant believes the evidence should be considered in a manner he desires, the Board's decision was neither arbitrary nor capricious and was based on the evidence provided. Therefore, the Board recommends against correcting the applicant's records.

4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

### **RECOMMENDATION**

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

### **CERTIFICATION**

The following quorum of the Board, as defined in the Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2016-02704-4 in Executive Session on 22 Feb 23 and 2 Mar 23:

, Panel Chair  
, Panel Member  
, Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit R: Record of Proceedings, w/ Exhibits A-Q, dated 2 Jun 21.  
Exhibit S: Applicant's Appeal to SecDef, dated 13 Sep 22.  
Exhibit T: OUSD Remand to AFBCMR, dated 20 Jan 23.  
Exhibit U: SAF/IG Report, ACTS 2012-017204. (WITHDRAWN).  
Exhibit V: SAF/IG Report, ACTS 2013-02044. (WITHDRAWN).  
Exhibit W. SAF/IG Reports. (WITHDRAWN).  
Exhibit X. Applicant's Additional Submission, undated.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.